89- 1462

No.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THOMAS M. HAAS, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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March 16, 1990

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QUESTION PRESENTED

Whether an unexcused delay of 22 months between notice to the government of a possible violation of the terms of probation and the filing of a revocation action violates a probationer's constitutional right to due process or constitutes a gross abuse of discretion requiring reinstatement of probation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	5
CONCLUSION	13

TABLE OF AUTHORITIES

CASES

	Page
Bankers Life and Casualty Co. v. *Crenshaw*, 108 S.Ct. 1645 (1988)	12
Carden v. *Arkoma Assoc.*, 109 S.Ct. 1952 (1989)	12
Gagnon v. *Scarpelli*, 411 U.S. 778 (1973)	6
Gideon v. *Wainwright*, 372 U.S. 335 (1963)	12
Greene v. *Michigan Dept. of Corrections*, 315 F.2d 546 (6th Cir. 1963)	10
Lytle v. *Household Mfg., Inc.*, 109 S.Ct. 3239 (1989)	12
Kartman v. *Parratt*, 535 F.2d 450 (8th Cir. 1976)	11
Mallard v. *United States District Court*, 109 S.Ct. 1814 (1989)	12
Morrisey v. *Brewer*, 408 U.S. 471 (1972)	5, 6, 7
NLRB v. *Sears Roebuck & Co.*, 421 U.S. 132 (1975)	12
Taylor v. *McKeithen*, 407 U.S. 191 (1972)	12
United States v. *$8,850.00*, 461 U.S. 555 (1983)	7
United States v. *Butler*, 792 F.2d 1528 (11th Cir.), *cert. denied*, 479 U.S. 933 (1986)	11
United States v. *Hamilton*, 708 F.2d 1412 (9th Cir. 1983)	5, 8, 9, 10
U.S. v. *Judge*, 88-1564	12
United States v. *Lovasco*, 431 U.S. 783 (1977)	7
United States v. *Marion*, 404 U.S. 307 (1971)	7
United States v. *Sciuto*, 531 F.2d 842 (7th Cir. 1976)	10
United States v. *Tyler*, 605 F.2d 851 (5th Cir. 1979)	5, 8, 9, 10
Will v. *United States*, 389 U.S. 90 (1967)	12

CONSTITUTIONAL AMENDMENTS

U.S. Const. amend. V	2

STATUTES

28 U.S.C. § 1254(1)	1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No.

THOMAS M. HAAS, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Thomas M. Haas hereby petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The order of the court of appeals (App., *infra*, 1a), filed without an opinion pursuant to local rule 36-1, is not reported. The order of the district court revoking petitioner's probation (App., *infra*, 3a-5a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 1989, and a petition for rehearing was denied on December 21, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. V.

STATEMENT

In 1984, petitioner Thomas Haas, pleaded guilty to a one-count indictment of conspiracy to distribute marijuana. He received a five-year suspended prison sentence, and was placed on probation for five years. In November, 1988, the United States moved to revoke his probation. The sole basis for this revocation action was an event that had occurred some 22 months before, and about which the government was informed at the time. After a hearing, the district court granted the government's request and sentenced petitioner to five years' imprisonment. The district court summarily rejected petitioner's claim that probation revocation cannot justly be based solely on two year old events. On appeal, the court of appeals also summarily affirmed, despite the United States' concession that to so hold would place the Eleventh Circuit in conflict with the Fifth and Ninth Circuits. It is this divergence among the circuits on an important issue concerning probation revocation that is the basis for this petition.

1. Petitioner's case was initially referred to probation officer Charles Perkins. During the next three years, petitioner maintained a close and personal relationship with Perkins that involved informal but frequent contact. Perkins Aff. 4. It was undisputed during the probation revocation proceedings before the district court that petitioner was a determined probationer, fully committed to his own rehabilitation. His efforts toward this end began even before his conviction. Haas Sr. Aff. 1

He married and purchased a home in Mobile, Alabama. He started his own business as a charter pilot and eventually acquired his own plane. His clients included United States Senator Denton of Alabama and his associates with whom petitioner flew on several campaign and business trips. *Id.* at 3. Petitioner established ties in the community and performed numerous hours of community service there.

The events that ultimately led to petitioner's incarceration occurred two years before any revocation proceedings were initiated against him. In September or October 1986, petitioner was contacted by Lucious Allen Tharp, who had been involved with petitioner in the distribution of marijuana before petitioner's conviction. Petitioner agreed to lease his plane to Tharp and his pilot for use in Tharp's new business. About one month later, Tharp sought petitioner's assistance in securing an airplane for this business. Petitioner found a plane for Tharp to purchase, and acted as a broker in that transaction.

In early February 1987, petitioner first learned that Tharp actually intended to use the plane in a drug smuggling operation. He immediately notified his father, his probation officer and a Customs Agent of his contact with Tharp and of Tharp's plans. At the suggestion of the agents investigating Tharp, and after notifying and obtaining permission from the district court, petitioner agreed to testify against Tharp as a rebuttal witness. With the aid of petitioner's testimony, Tharp was convicted in August 1987.

Petitioner's probation continued thereafter without incident. He took a permanent job as a private pilot for a local company. He was actively involved in his community and received commendations for his volunteer work. He received exemplary reviews from his probation officer. In sum, other than petitioner's contact with Tharp, it was undisputed before the district court that petitioner was a model probationer.

2. In September 1988, petitioner's case was reassigned to a new probation officer, Donna Alexander. With this change in personnel came a completely new and more formal style of probation. For instance, unlike his first probation officer, Alexander required petitioner to submit frequent urine samples, and to receive prior approval for each flight he took as part of his job. She even suggested that petitioner notify each of his customers that he was a convicted felon before being hired. It was undisputed at the hearing that petitioner complied fully with all the new conditions of his probation during this period.

On November 23, 1988, two months after she took over the case, Alexander initiated revocation proceedings against petitioner. The revocation petition was not filed on the basis of any new information, nor was revocation sought on the basis of the cumulative effect of past activities in combination with any current behavior. Instead, Alexander filed charges based *solely* upon the events surrounding petitioner's prior association with Tharp, which occurred approximately two years earlier.

At the revocation hearing, testimony centered upon whether petitioner knew that Tharp was participating in illegal drug smuggling prior to the time that he notified his probation officer and ended his association with Tharp. The district court ruled that petitioner, in fact, had violated the terms of his probation,[1] and sentenced him to serve the full amount of the suspended prison sentence of five years. In a motion to reconsider, petitioner

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[1] The terms of petitioner's probation required that he refrain from engaging in criminal activities, and associate only with "law abiding persons." In addition, the district court instructed petitioner that, if he was contacted by anyone involved in criminal conduct he should not undertake on his own to engage in "undercover activity." Rather, he was instructed to report the contact either to his father (an attorney who was serving as a probation consultant by order of the court), to his probation officer or to other law enforcement officials. (App., *infra*, 3a).

challenged the revocation proceedings in light of the unreasonable delay before the petition was filed. The district court denied that motion on the merits, without explanation. (App. *infra*, 6a).

3. On appeal, the United States essentially conceded that the delay in bringing a probation revocation action raised a serious due process issue under the Fifth and Ninth Circuit decisions in *United States* v. *Tyler*, 605 F.2d 851 (5th Cir. 1979) and *United States* v. *Hamilton*, 708 F.2d 1412 (9th Cir. 1983).[2] However, the United States argued that the Eleventh Circuit should reject those precedents, and apply a contrary standard under which a due process violation would be established only where the probationer could demonstrate actual prejudice caused by the delay. App., *infra*, 10a. The court of appeals, without explanation, affirmed the revocation of probation.

REASONS FOR GRANTING THE PETITION

The revocation of petitioner's five-year probation after more than four years of successful rehabilitation, and the imposition of a full five-year prison sentence for a criminal act performed over seven years earlier, obviously constitutes an extraordinary personal tragedy. Moreover, it is wholly inconsistent with the goals of the probationary system. This is not a case where the probationer could not "be counted on to avoid antisocial activity." *Morrissey* v. *Brewer*, 408 U.S. 471, 479 (1972). To the contrary, petitioner had established over an extended period of time that he could and would act in accordance with the law. The only reason that peti-

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[2] In its brief on appeal to the Eleventh Circuit, the government also conceded that the delay was at least 22 months long. App. *infra*, 12a. In addition, at oral argument, the government conceded that both petitioner's probation officer and the district court had been notified of the alleged probation violation no later than August, 1987 and that there was no reason for the government to delay filing its revocation petition after that date.

tioner is in a federal prison today, instead of being lawfully employed and finished with his probationary supervision, is that the routine change in the identity of his probation officer brought about an official "reconsideration" of a two-year old involvement with a non-"law abiding person."[3] That result—and the government's conduct in this case—were fundamentally unfair.

Specifically, this case is worthy of review by this Court because the Eleventh Circuit's decision that the two-year delay in probation revocation did not violate petitioner's due process rights or was not otherwise an abuse of discretion, raises an important issue of federal law upon which the courts of appeals are clearly divided. The law is well settled in the Fifth and Ninth Circuits that the government, once notified of a probation violation, must act within a reasonable period to revoke probation and cannot rely upon a "stale" violation as the sole basis for bringing a revocation action. The law in the Eighth Circuit, by contrast, requires a probationer to demonstrate that the delay prejudiced his ability to challenge the revocation decision. That was the rule the United States urged the court of appeals to apply here and, in affirming the revocation of probation, the Eleventh Circuit has adopted the Eighth Circuit's approach. Because this case squarely presents this conflict among the courts of appeals on a recurring and important issue of federal law, the Court should grant the petition.

1. There can be no doubt that petitioner, as a probationer, is entitled to both procedural and substantive due process protection with respect to any efforts to revoke his probation. *Gagnon* v. *Scarpelli*, 411 U.S. 778, 781 (1973). At a minimum, a probationer is entitled to a revocation process that comports with fundamental fairness. *Morrissey* v. *Brewer*, 408 U.S. at 484. This Court consistently has recognized in both criminal and quasi-criminal proceedings that unexcused delay prior to the

[3] See note 1, *supra*.

initiation of formal action by the government to deprive someone of a liberty interest can constitute a violation of due process, even if the underlying action of the government is otherwise justified. See *United States* v. *Lovasco*, 431 U.S. 783 (1977); *United States* v. *$8,850.00*, 461 U.S. 555 (1983). There is no reason to deny a probationer the same protection from arbitrary government delay that a criminal suspect receives. If anything, delay is less justified in a probation case because the probationer lives under a significant cloud that does not hamper the average citizen who has been neither arrested nor indicted. See *United States* v. *Marion*, 404 U.S. 307, 321 (1971).

Moreover, the goals of the probationary system itself would seem to be served best by a scheme that requires the government to act with reasonable speed when it has been informed that a condition of probation has been violated. As this Court has previously acknowledged:

> The parolee is not the only one who has a stake in his conditional liberty. Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law. Society thus has an interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole, given the breach of parole conditions.

Morrissey v. *Brewer*, 408 U.S. at 484. Reliance upon stale events as the basis for revoking probation thus undermines both important purposes described in *Morrisey—i.e.*, the interest in accurate decisionmaking and the interest in a fair evaluation of the probationer's overall situation.

2. Based on these general principles, the Fifth and Ninth Circuits have adopted restrictions on the amount of government delay in bringing probation revocation proceedings that will be judicially tolerated. Although the Fifth Circuit derives its approach from the Fifth Amendment and the Ninth Circuit analyzes the problem

in terms of consistency with the goals of probation generally, both courts hold that an unreasonably lengthy delay in bringing a revocation proceeding is impermissible. In circumstances involving significant delay, both circuits require that the revocation order be vacated without any inquiry into the prejudicial effect or delay upon the probationer's ability to challenge the revocation. Instead, each recognizes that, regardless of prejudice, it is fundamentally unfair for the government to ignore probation violation for more than a year and then suddenly withdraw the individual's freedom.

In *United States* v. *Tyler*, 605 F.2d 851 (5th Cir. 1979), the Fifth Circuit held that a delay of more than a year from the date a probation officer is made aware of violations until a revocation petition is filed is fundamentally unfair and thus violates Fifth Amendment procedural due process. In that case, the probationer challenged revocation proceedings brought on the basis of misdemeanor charges that were known by the officer for over a year.

The court held that unless the probationer had deceived the probation officer, or some other unusual circumstances delayed the date of actual notice, the delay itself rendered the proceedings fundamentally unfair. *Id.* at 853. The court focused on the dual purpose of the probationary system and the corresponding duties of the probation officer in making a decision. "The probationary system . . . imposes a duty on a probation officer to represent the interests of both society and the probationer. An unreasonable delay in bringing charges of violations or a piecemeal approach in seeking revocation will rarely, if ever, serve the interests of either." *Id.*

In *United States* v. *Hamilton*, 708 F.2d 1412 (9th Cir. 1983), the Ninth Circuit—on facts almost identical to those presented here—reversed a probation revocation based on events which were known to the court and probation officer three years before revocation was sought. Then-Judge Kennedy, writing on behalf of the majority,

reached this conclusion without addressing any constitutional issue, holding instead that the district court's decision to revoke probation was an abuse of discretion. *Id.* at 1414. In that case, the probationer was charged with four separate violations. The most serious of these had occurred three years earlier when the defendant failed to complete eleven of 60 scheduled weekends in a halfway house. Although the probationer promptly notified both his probation officer and the court about it, neither indicated concern over the error nor took any corrective action. It was not until the final year of his probationary term, when a new probation officer was assigned to the case, that revocation was sought.

The majority, over the dissent of Judge Poole, reasoned that:

> [r]evocation of probation after unreasonable delay or under circumstances inherently misleading to the probationer is an abuse of discretion . . . At some point, . . . violations of which the district court has been apprised and upon which the probationer has sought corrective action become stale or are waived as a basis for revoking probation.

Id. at 1415 (citing *Tyler*, 605 F.2d at 853). The court concluded that three years was an unreasonable period of delay. Furthermore, the Ninth Circuit expressed particular concern over the effect that a change in probation officers may have on a probationer's understanding of and ability to comply with the terms of his probation: "The interests of fairness require some level of consistency in the supervision of a probationer. If a newly assigned probation officer intends to enforce probation conditions more stringently than his predecessor, the probationer must be advised of that policy before its violation can become the basis for revocation." *Hamilton*, 708 F.2d at 1415.

It is clear that petitioner's challenge to the timing of the revocation proceeding would have succeeded in either the Fifth or Ninth Circuits. The probation violations with

which petitioner was charged all arose out of a single incident that the government has conceded took place at least 22 months before a revocation proceeding was initiated. App., *infra*, 8a. Moreover, there is no question on this record that it was only the change of probation officers that resulted in the revocation of petitioner's probation. If, under these circumstances, petitioner had been on probation in California, rather than Alabama, he would be a free man today. Uniformity in federal criminal law enforcement should ensure that he receives equal treatment. In sum, the holding of the court of appeals here poses a stark conflict in the circuits that this Court should resolve.[4]

This conflict in the circuits is broader than that posed by the conflict between the Fifth and Ninth Circuits and the decision in this case. Prior to the judgment below, the Eighth Circuit had adopted a more restrictive approach under which a delay does not require reversal of a revoca-

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[4] Rulings in other Circuits that have addressed this issue support the position taken by the Fifth and Ninth Circuits. These cases all indicate that, in the absence of actual deception or cumulative offenses by the probationer, delay of revocation proceedings caused by the government's failure to initiate proceedings is fundamentally unfair. See, *e.g.*, *United States* v. *Sciuto*, 531 F.2d 842, 847 (7th Cir. 1976) ("[w]hether the delay was unreasonable depends upon whether Sciuto deceived the probation officer"); *Greene* v. *Michigan Dept. of Corrections*, 315 F.2d 546, 547 (6th Cir. 1963) (failure to exercise reasonable diligence to revoke parole "may result in a waiver of the violation and loss of jurisdiction").

In the court of appeals, the government did assert that petitioner was responsible for some portion of the delay because he asked that the Tharp investigation be delayed and he did not immediately reveal the full extent of his involvement to his probation officer. App., *infra*, 13a. But see note 1, *supra* (U.S. conceded 22 month delay). But even accepting these arguments at face value, the government's responsibility for the delay still began sometime in 1987 after August. The revocation proceeding was not brought until just before Thanksgiving 1988—between 12 and 15 months later. Thus, the facts, even as set out by the United States in its brief below, do not bring this case within the exception for delay in *Sciuto* but do squarely raise the issue decided in *Tyler* and *Hamilton*.

tion order unless the probationer can demonstrate actual prejudice. *Kartman* v. *Parratt*, 535 F.2d 450, 455 (8th Cir. 1976) "[A]nalogizing to cases of preindictment delay," the court in *Kartman* rejected a challenge to a revocation order on the ground that "appellant has alleged no specific prejudice which resulted from this delay." *Id.*

Although there had been no prior Eleventh Circuit decision on this issue, the United States urged the court of appeals in this case to adopt the same pre-indictment delay analogy embraced by the Eighth Circuit. After describing the holdings of the Fifth and Ninth Circuits, the United States did not attempt to distinguish them. Instead, the government urged the court to employ "a two-part analysis" that is used in determining whether pre-indictment delay violates the Fifth Amendment Due Process Clause. App., *infra*, 10a. Under this pre-indictment standard, petitioner would be required to show "actual prejudice to the conduct of his defense, and that the delay was the product of deliberate action by the government designed to gain a tactical advantage." *Id.*, citing *United States* v. *Butler*, 792 F.2d 1528, 1533 (11th Cir.), *cert. denied*, 479 U.S. 933 (1986). The government concluded by asserting that the delay did not require reversal because "[petitioner] has failed to establish prejudice . . . ." App., *infra*, 14a.

Apparently, the panel accepted uncritically the government's claim that the pre-indictment delay cases provided an apt analogy. The panel simply affirmed by order, notwithstanding the government's concession that the law of two sister circuits deviated from the legal standard it proposed in its brief. In the face of a conceded conflict in the circuits, the court of appeals' decision not to file an opinion explaining its decision to deprive petitioner of his liberty simply compounds the procedural unfairness that has characterized this proceeding.

3. The Eleventh Circuit's failure to issue an opinion explicitly setting forth its reasoning should provide no

basis for denying review of its judgment. The existence of written conflicting opinions, in the Fifth, Eighth, and Ninth Circuits, ensures that the lack of an opinion in this case will not hinder this Court's deliberations. Furthermore, the argument for granting certiorari is much stronger here than in most instances in which a court of appeals affirms without an opinion because there already is a conflict in the circuits on the proper legal standards to apply. Thus, the only real question is whether this case presents a suitable vehicle for resolving that issue. The government's own brief in the court of appeals demonstrates that the legal issue of delay is starkly posed in this case and therefore it is an appropriate one in which to decide the question.

Moreover, this Court in the past has granted certiorari to review orders issued without opinion when fundamental fairness required that result. See, *e.g.*, *Gideon* v. *Wainwright*, 372 U.S. 335, 337 (1963); *Mallard* v. *United States District Court*, 109 S.Ct. 1814, 1815 (1989); *Bankers Life and Casualty Co.* v. *Crenshaw*, 108 S.Ct. 1645, 1649 (1988); *Taylor* v. *McKeithen*, 407 U.S. 191 (1972); *NLRB* v. *Sears Roebuck & Co.*, 421 U.S. 132, 147 (1975); *Will* v. *United States*, 389 U.S. 90, 94 (1967).[5] Finally, the courts of appeals have an obligation—particularly when they are creating a conflict with a sister circuit—to provide a reasoned explanation for their actions. It would be highly inappropriate to allow important issues, such as the one raised in this case, to escape review by this Court simply because there is no published opinion.

It is difficult to imagine a case where simple justice calls out for review and reversal as clearly as this one.

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[5] At least three decisions reviewing judgments in which no published opinion was issued will be or have been decided by the Court in the 1989 Term. See *Lytle* v. *Household Mfg., Inc.*, 109 S.Ct. 3239 (1989); *Carden* v. *Arkoma Assoc.*, 109 S.Ct. 1952 (1989); *U.S.* v. *Judge*, 88-1564 (pending).

Petitioner is now serving five years imprisonment under an undeniably stale probation offense which had been pressed as the sole basis for revocation of his probation almost two years after the fact, for no reason other than the idiosyncratic view of a new probation officer. An attempt to revoke probation under such circumstances clearly would have been rejected by at least two other courts of appeals. The Court should grant this petition to resolve this conflict in the circuits and to define the reach of the basic protections from unexcused government delay to which probationers are entitled in the probation revocation context.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 16, 1990

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-7244

D. C. Docket No. 84-00005-BH

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

THOMAS M. HAAS, JR.,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Alabama

(November 15, 1989)

Before TJOFLAT, Chief Judge, ANDERSON and CLARK, Circuit Judges.

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-7244

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

THOMAS M. HAAS, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Alabama

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion November 15, 1989, 11 Cir., 198 , —— F.2d ——) (Dec. 21, 1989)

Before TJOFLAT, Chief Circuit Judge, ANDERSON and CLARK, Circuit Judges.

PER CURIAM:

(√) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Thomas A. Clark
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Criminal No. 84-00005-BH

UNITED STATES OF AMERICA

vs.

THOMAS M. HAAS, JR.

MEMORANDUM OPINION AND ORDER

On November 22, 1988, the Probation Office filed a petition with this Court requesting the revocation of probation of the above-named defendant, alleging, among other things, that said defendant violated the following terms and conditions of his probation; to-wit:

> 1) "You shall refrain from violation of any law (federal, state or local). You shall get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer." in that the defendant testified during the trial of U.S. v. Lucious Allen Tharp, which took place on August 11-13, 1987, in the Middle District of Florida. The defendant testified regarding his activities and knowledge of the smuggling venture which resulted in Mr. Tharp's arrest and the seizure of 325 kilograms of cocaine.
>
> 2) "You shall associate only with law-abiding persons and maintain reasonable hours." in that according to the defendant's testimony in the trial of U.S. v. Lucious Allen Tharp, the defendant stated that he had ongoing and frequent contacts with Mr. Tharp in

making the arrangements regarding the importation of a controlled substance.

9) "You shall refrain from contact or activities which would give reasonable cause to believe you have violated any criminal law."

Special Condition #7. "If the defendant is contacted by persons wanting him to engage in any illegal activities, he should immediately notify the Probation Officer, his father, or other appropriate law enforcement authorities. Also, he should not act as an informant in any capacity." in that the defendant did not contact his probation officer, his father or other law enforcement officials when he was approached by Mr. Tharp. It was only after the plane had been seized by Customs and Mr. Tharp was indicted by the United States Attorney's Office in Tampa, Florida that the defendant notified the Probation Officer of his involvement.

After reviewing the testimony presented by the government and the defendant, the Court is of the opinion that the defendant did, in fact violate certain conditions of his probation. The testimony shows the following:

1. The defendant associated with a known felon, Lucious Allen Tharp. Such association is a direct violation of Condition 2 of the Conditions of Probation.

2. The defendant knew that Mr. Tharp was participating in an illegal activity, i.e., the illegal importation of contraband, yet continued to associate with Mr. Tharp, and in fact participated in said activity by attempting to secure, and securing an airplane for use in furtherance of the aforementioned activity. (See Government's Exhibit 1, pp. 110-111). Such knowledge and participation are direct violations of Conditions 1, 2 and 9 of the Conditions of Probation.

The above premises considered, this Court is of the opinion, and hereby ORDERS that probation heretofore

imposed on the defendant be REVOKED and that the defendant be remanded to the custody of the Attorney General or his authorized representative for a period of five (5) years, less any credits to which defendant may now be entitled. It is FURTHER ORDERED that the defendant report to the institution designated by the United States Marshal at a date to be arranged by the United States Marshal. As this sentence is imposed under the laws in force prior to the application of the Sentencing Reform Act, said sentence shall be imposed with parole determinable by the Bureau of Prisons.

DONE this 15th day of February, 1989.

/s/ W. B. Hand
Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Criminal Action No. 84-00005

UNITED STATES OF AMERICA

vs.

THOMAS M. HAAS, JR.

ORDER

This cause comes before the Court on defendant's motion filed February 23, 1989, requesting that this case be reopened for the purpose of permitting the defendant to produce additional relevant evidence indicating his compliance with the terms of his probation.

The Court has reviewed the briefs and exhibits provided by the parties pursuant to the Order of February 27, 1989 and now made a part of the record and hereby determines that the information contained therein in no way serves to contradict the findings set out in the Memorandum Opinion and Order entered in this matter on February 15, 1989. Consequently, the Court remains reasonably satisfied that the defendant's conduct was not in compliance with the conditions of probation.

Therefore, the defendant's motion to reopen this matter for introduction of additional evidence is due to be, and same is hereby DENIED, and the Order revoking defendant's probation is due to be and is hereby AFFIRMED.

It is so ORDERED.

DONE this 27th day of March, 1989.

/s/ W. B. Hand
Senior District Judge

APPENDIX D

89-7244

IN THE UNITED STATES DISTRICT COURT
FOR THE ELEVENTH CIRCUIT

89-7244

THOMAS M. HAAS, JR.,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF THE APPELLEE

JURISDICTION

This is an appeal from the United States District Court for the Southern District of Alabama.

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* * * *

ARGUMENT

I.

THERE WAS NO UNREASONABLE DELAY IN INITIATING THE REVOCATION PROCEEDINGS, AND THE DELAY THAT OCCURRED RESULTED FROM THE APPELLANT'S OWN CONDUCT.

Haas correctly cited *Gagnon v. Scarpelli*, 411 U.S. 778, 782, 93 S.Ct. 1756, 1759-60 (1973), for the proposition that the due process guaranteed in the 5th and 14th Amendments applies to probation revocation proceedings. This due process requires notice and a hearing before probation can be revoked. *Id.* This procedure is codified by Rule 32.1 of the *Federal Rules of Criminal Procedure*. In this first issue, Haas did not complain of a deficiency in the proceeding; rather, he claimed that a 22-month delay in initiation of the probation proceeding was so unreasonable that it prejudiced the presentation of his evidence, thus depriving him of due process.

Haas cited two cases in support of his position. In *United States v. Tyler*, 605 F.2d 851 (5th Cir. 1979), the defendant was convicted of three misdemeanors in a two year period, during which he was on probation. A year after the last conviction, the defendant's probation officer filed a petition to revoke on other grounds, the probation officer did not mention the misdemeanor convictions in this petition even though he was aware of them. The first petition was denied. Six months later, the probation officer filed another revocation petition, which cited as grounds the three misdemeanor convictions. Although the second petition was granted, the former Fifth Circuit held that the long delay, coupled with the probation officer's obvious decision not to rely on the convictions as grounds for revocation in the first petition, constituted fundamental unfairness. *Id.* at 853.

The Fifth Circuit distinguished *Tyler* from a similar situation in *United States v. Cornwell*, 625 F.2d 686 (5th

Cir.), *cert. denied* 449 U.S. 1066, 101 S.Ct. 794 (1980). A revocation petition alleging as its grounds that the defendant failed to report as required was filed. Before a hearing was conducted, the defendant was convicted of another offense. At the hearing, the defendant's attorney objected on grounds of relevance to any mention of the new charges or the conviction. This petition was denied and the probation officer filed a second petition, reciting the defendant's conviction as grounds. This petition was granted. The Court of Appeals found that no due process violation occurred in this case, particularly since the defendant himself objected to the inclusion of the conviction as a ground for revocation in the first hearing. *Id.*, at 687.

Haas' second case is *United States v. Hamilton*, 708 F.2d 1412 (9th Cir. 1983). The grounds alleged for the probation revocation in *Hamilton* were: (1) Failure to complete 120 days in a jail-type institution; (2) Failure to report to his probation officer on a specific date; (3) Failure to appear before the district court on two specific dates; and (4) Failure to work at a lawful occupation. The defendant presented evidence to refute three of these grounds. He conceded his failure to complete the jail term, but presnted evidence that he informed the court of his default on his own initiative and that the court took no action to reschedule the remaining time to serve or to revoke the probation. *Id.*, at 1414.

A few weeks shy of three years later, the defendant was assigned to a new probation officer, who attempted to mail information to the defendant in an effort to require him to come to the office,. The failure to appear was occasioned from a delay in his receipt of the information mailed, because the defendant had changed addresses. He informed his former probation officer, who was apparently satisfied but made no formal file entry about the address change. *Id.*

The Ninth Circuit found that revocation of the defendant's probation under these circumstances constituted

abuse of discretion. The primary facts which persuaded appellate court were that the district court had notice at least three years prior to the revocation hearing that the defendant had not served his 120-day jail term, that the district court took no action, either to rebuke the defendant or to reschedule his jail term, and that the first probation officer took no action. *Id.*, 1414-15. The appellate court noted that the probationary system imposes upon its officers a duty to represent the interest of society and the defendant, and found that neither interest is served by the district court's penalizing the defendant for his failure to anticipate and respond to the vastly disparate expectations of different probation officers who may be assigned to his case. *Id.*, at 1415. The court further noted that the "interests of fairness" require some consistency in supervision of a defendant on probation, so that where a different probation officer assigned to the defendants case intends to enforce probation conditions more stringently than the previous officer, the defendant must be advised of that policy before its violation can become the basis for revocation. *Id. But see, id.*, at 1416-17 (Poole, J., dissenting).

The Eleventh Circuit, however, has used a two-part analysis in the determination of whether pre-indictment delay violated a defendant's Fifth Amendment due process rights. The defendant must show that the delay caused actual prejudice to the conduct of his defense, and that the delay was the product of deliberate action by the government designed to gain a tactical advantage. *United States v. Butler*, 792 F.2d 1528, 1533 (11th Cir. 1986), *cert. denied*, 479 U.S. 933, 107 S.Ct. 407 (1987).

Prejudice in this sense will not be presumed because of lengthy delay in initiating prosecution. General allegations of loss of witnesses and failure of memories are insufficient to demonstrate the actual prejudice required. *Id.*, at 1533. He must establish that the loss impaired his ability to prove a meaningful defense. *Id.*, at 1534. Even

where prejudice due to delay is shown, no due process claim is established without a showing that the delay was deliberate and was instituted to give the government a tactical advantage. *Id.* The government may not be "interested" in the case, but the mere fact of the government's inaction, standing alone, does not establish that the government's actions were motivated by an attempt to gain a tactical advantage. *Id.*

The four-prong test enunciated in *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182 (1972), was developed initially for analysis of a defendant's claim that his Sixth Amendment right to a speedy trial was violated. *Id.*, at 530, 92 S.Ct. at 2192. This four-part analysis has been used in other situations where a party claims prejudice from a delay. *See, e.g., United States v. Campbell*, 531 F.2d 1333, 1335 (5th Cir. 1976), *cert. denied*, 434 U.S. 851, 98 S.Ct. 164 (1977) (delay in sentencing); *United States v. $8,850.00 in U. S. Currency*, 461 U.S. 555, 103 S.Ct. 2005 (1983) (delay in institution of forfeiture *in rem* proceedings).

The Ninth Circuit has utilized a two-part analysis in the context of a delay in the institution of parole revocation proceedings. The delay must be caused by government action which was not the result of the defendant's own conduct, and the delay must have prejudicially affected the defendants ability to contest the revocation. *United States v. Wickham*, 618 F.2d 1307, 1310 (9th Cir. 1979). The defendant may show prejudice by establishing difficulty in contesting the alleged facts constituting the alleged violations; hardship in finding and presenting favorable witnesses, or inability to produce evidence of mitigating circumstances which might result in continued probation despite the violation. *Id.* In *Wickham*, the Ninth Circuit found that the seven-month delay in conducting the defendant's parole revocation hearing was not unreasonable under the circumstances and that the defendant was not prejudiced by the delay. *Id.*, at 1311.

The government submits that the two-part test utilized in *United States v. Butler, supra,* ought to apply to the circumstances in the case at bar. In *Wickham,* the defendant was taken into custody after the federal warrant for his parole revocation was executed. The delay resulted because the state charges giving rise to the parole violation were resolved before his parole revocation hearing was conducted. Because in the case at bar, no warrant or summons was issued and Haas remained at liberty during the 22-month period about which he has complained, the *Butler* test used for analysis of pre-indictment delay is application. [sic] Haas has failed to establish a due process violation under this analysis. Even utilizing the two-part *Butler* test, Haas can not prevail where the delay was attributable at least in part to his own conduct.

The government's evidence established that the investigation involving Tharp was initiated on January 12, 1987. (R2-74). Tharp was identified as one of the people who accompanied Haas to Bay Minette from November 1986 through January 1987 in the Aerocommander. (R2-46/48, 74). The United States Customs Service had previously received information that Tharp was in Mobile with the Aerocommander attempting to obtain a pilot to fly to Colombia to pick up a load of drugs. (R2-74).

Haas only reported his airplane business with Tharp to law enforcement agents after he was questioned about the Aerocommander in Panama City by United States Customs Agent Betty Commerford on February 6, 1987. (R3-122, 123/124). Haas discovered she was making inquiries about the plane and approached her there, disclosing at that time that he was trying to sell the Aerocommander to Tharp. (R3-123). He told her that he did not believe the deal would close, but that if it did he would notify law enforcement agents in Mobile (R3-123/124). Haas did not mention his previous association with Tharp as a smuggler. (R2-124).

On February 9, Haas provided Customs Service Special Agent Kyle Barnette with an interview regarding the Aerocommander. (R2-75). Haas told Special Agent Barnette that Tharp was a smuggler, that Tharp was purchasing the Aerocommander, and that he brokered the deal. (R2-69). Haas also told Special Agent Barnette he did not know what Tharp intended to do with the Aerocommander. (R2-69; Defendant's Exhibit 7, at 2). The plane was seized on February 24, 1987 at Bay Minette by Customs agents. Only after the seizure did Haas contact Agent Odom at DEA in Mobile. (R2-55). Agent Odom testified that Haas was trying to get information about the seizure of the plane, that Tharp was from Florida, that Tharp asked his help in locating a plane to be used in the watermelon business and that Haas believed him. (R2-56). Haas did not relate to Agent Odom any information at that time which inculpated him in any way. (R2-54/55).

Haas was considered a subject of the investigation after February 6, 1987. (R2-76). Haas was informed in August, 1987 that he had exposure to criminal prosecution from his participation with Tharp in the Middle District of Florida, and the fact of his testimony in the trial would not shield him from prosecution. (R2-71/72, 79). For the first time during that testimony, Haas admitted that he knew Tharp's intentions for the Aerocommander. (Government Exhibit 1 at 110/112). Even in his written report to his probation officer dated August 18, 1987, he did not indicate the extent of his involvement. (R1-23-8). The investigation, which was being conducted in the Middle District of Florida, was continuing. (R1-21-5). Haas consented to this delay to woo the government through his promise to cooperate. (R1-21-5). From approximately 60 days after August 17, 1987 until the summons was issued, the record reflects that Haas' criminal participation was to be presented to a grand jury in Florida. (R1-21-5, paragraph 2).

This situation is similar to the one in *United States v. Petsas*, 592 F.2d 525 (9th Cir.), *cert. denied*, 442 U.S. 910, 99 S.Ct. 2824 (1979). Due process does not require the government to immediately commence criminal proceedings against a probationer, particularly where she agreed to a period of deferred prosecution. *Id.*, at 527. Haas likewise agreed to delay the investigation into his criminal conduct for at least 60 days after his testimony. *See also, Morrissey v. Brewer*, 408 U.S. 471, 479, 91 S.Ct. 2593, 2599 (1972) (parole or probation officers can wait to assess the cumulative effect of the suspected violations before initiating revocation proceedings). Likewise, where the delay is in part due to the defendant's deception of his probation officer, it is chargeable to the probationer and not the government. *United States v. Sciuto*, 531 F.2d 842, 845-46 (7th Cir. 1976).

The records in the case at bar reveals a combination of these two reasons for the delay, that Haas did not immediately disclose the extent of his participation and that Haas agreed with the government to delay the investigation into his conduct in the Middle District of Florida. Therefore, the government is not solely responsible for the delay. Furthermore, the delay was not unreasonable in light of the propositions of law which allow both the government some leeway in the timing of its investigations and the probation officer some time to assess the cumulative effect of the suspected violations before initiating proceedings.

Additionally, Haas failed to establish prejudice, as required in *United States v. Butler, supra*, 793 F.2d at 1533-34. General allegations of loss of witnesses and failure of memories are too speculative to demonstrate the actual prejudice required. *Id.* Haas claimed that Agent Odom's memory was lost, when in fact Agent Odom simply testified against him. (See R2-55/56). Haas likewise claimed his probation officer's memory was lost due to the delay. The government submits that this

additionally [sic] delay is attributable to Haas himself, who requested and received from December 15 to January 6 for the presentation of his evidence, and failed to obtain Perkins' affidavit until March 5, 1989. (R1-28-7/9). Although the probation file did not reflect any of Haas' claimed conversations with Perkins about Tharp, Haas himself provided this testimony in the second hearing. (R3-92/93).

Therefore, Haas has failed to establish a showing that the pre-filing delay in instituting his probation revocation resulted in denial of due process under the Fifth and Fourteenth Amendments.

* * * *

Supreme Court, U.S.
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No. 89-1462

In the Supreme Court of the United States

OCTOBER TERM, 1989

THOMAS M. HAAS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the delay in filing for revocation of petitioner's probation violated the Due Process Clause of the Fifth Amendment or otherwise barred the district court from revoking probation.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	10
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Arizona v. *Youngblood*, 109 S. Ct. 333 (1988) .. 12
Bearden v. *Georgia*, 461 U.S. 660 (1983) 10
Black v. *Romano*, 471 U.S. 606 (1985) 10
Gagnon v. *Scarpelli*, 411 U.S. 778 (1973) 10
Greene v. *Michigan Dep't of Corrections*, 315 F.2d 546 (6th Cir. 1963) 15, 16
Griffin v. *Wisconsin*, 483 U.S. 868 (1987) 10
Kartman v. *Parratt*, 535 F.2d 450 (8th Cir. 1976) 12
Morrissey v. *Brewer*, 408 U.S. 471 (1972) 10
United States v. *Atisha*, 804 F.2d 920 (6th Cir. 1986), cert. denied, 479 U.S. 1067 (1987) 11
United States v. *Brown*, 656 F.2d 1204 (5th Cir. 1981), cert. denied, 454 U.S. 1156 (1982) 12
United States v. *Caporale*, 806 F.2d 1487 (11th Cir. 1986), certs. denied, 482 U.S. 917, 483 U.S. 1021 (1987) 11
United States v. *Gouveia*, 467 U.S. 180 (1984) .. 11
United States v. *Hamilton*, 708 F.2d 1412 (9th Cir. 1983) 10, 13, 14, 15
United States v. *Hoo*, 825 F.2d 667 (2d Cir. 1987), cert. denied, 484 U.S. 1035 (1988) 11
United States v. *Ismaili*, 828 F.2d 153 (3d Cir. 1987), cert. denied, 485 U.S. 935 (1988) 11

Cases—Continued: Page

United States v. *Jenkins*, 701 F.2d 850 (10th Cir. 1983) 11
United States v. *Lebron-Gonzalez*, 816 F.2d 823 (1st Cir.), certs. denied, 484 U.S. 843, 857 (1987) 11
United States v. *Lovasco*, 431 U.S. 783 (1977) .. 10-11
United States v. *Marion*, 404 U.S. 307 (1971) .. 11
United States v. *Moran*, 759 F.2d 777 (9th Cir. 1985), cert. denied, 474 U.S. 1102 (1986) 12
United States v. *Rice*, 671 F.2d 455 (11th Cir. 1982). 10, 13
United States v. *Sciuto*, 531 F.2d 842 (7th Cir. 1976) 15, 16
United States v. *Townley*, 665 F.2d 579 (5th Cir.), cert. denied, 456 U.S. 1010 (1982) 12
United States v. *Tyler*, 605 F.2d 851 (5th Cir. 1979) 14, 15

Constitution, statutes, and rule:

U.S. Const. Amend. V (Due Process Clause) ... 9, 10, 12, 13, 16
18 U.S.C. 4205(c) 2
21 U.S.C. 963 2
Fed. R. Crim. P. 32.1 ..... 9, 10

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a) is unpublished, but the decision is noted at 891 F.2d 906 (Table). The memorandum opinion of the district court (Pet. App. 3a-5a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 1989. A petition for rehearing was denied on December 21, 1989. Pet. App. 2a. The petition for a writ of certiorari was filed on March 19, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After pleading guilty in the United States District Court for the Southern District of Alabama, petitioner was convicted on one count of conspiracy to import marijuana, in violation of 21 U.S.C. 963, and was placed on probation for five years. The district court later revoked petitioner's probation and sentenced him to a term of five years' imprisonment. The court of appeals affirmed without opinion.

1. In January 1984, petitioner pleaded guilty to one count of conspiracy to import approximately 400 pounds of marijuana, in violation of 21 U.S.C. 963.[1] Petitioner had served as a pilot in a marijuana smuggling operation. One of petitioner's friends, Lucious Allen Tharp, was convicted on unrelated marijuana smuggling charges and later sentenced to a term of imprisonment. The district court first sentenced petitioner to a provisional term of five years' imprisonment under 18 U.S.C. 4205(c). In February 1985, the district court suspended that sentence and placed petitioner on probation for a term of five years. Gov't C.A. Br. 2, 6.

The terms of petitioner's probation included, among other conditions, that petitioner "refrain from violation of any law (federal, state or local) * * * [and] get in touch immediately with [his] probation officer if arrested or questioned by a law-enforcement officer" (Condition 1), Pet. App. 3a, that he "associate only with law-abiding persons" (Condition 2), *ibid.*, and that he "refrain from contact or activities which would give reasonable cause to believe [he has] violated any criminal law" (Condition 9), *id.* at 4a. In addition, Special Condition 7 provided that "[i]f [petitioner] is contacted by persons wanting him to engage in any

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[1] The pertinent facts, which petitioner does not dispute here, are summarized in the government's briefs in the district court and court of appeals. See Gov't D.C. Br. 3-14; Gov't C.A. Br. 2-18.

illegal activities, he should immediately notify the Probation Officer, his father, or other appropriate law enforcement authorities," [2] and it specifically prohibited petitioner from "act[ing] as an informant in any capacity." *Ibid.*

2. Petitioner's adjustment to probation was routine until he renewed his association with Tharp. On October 31, 1986, petitioner met Tharp at a hotel coffee shop in Mobile, Alabama. Tharp, who remembered that petitioner was a pilot, sought petitioner's help in finding an airplane capable of smuggling narcotics from Colombia into the United States. Petitioner agreed to help. Petitioner also leased his own twin-engine plane to Tharp so that Tharp could look for a suitable plane as well. Petitioner and Tharp devised a cover story that the plane they were seeking would be used in Tharp's otherwise legitimate watermelon business. Gov't C.A. Br. 6-7.[3]

Petitioner called Tharp several weeks later asking him to return petitioner's plane. Petitioner explained that he had found a suitable plane for Tharp's needs, an Aerocommander. Petitioner also told Tharp that the plane would have to be inspected at Tharp's expense. Tharp agreed to pay petitioner for locating the Aerocommander and allow him to keep the plane after Tharp completed the smuggling trip. From November 1986 to January 1987, Tharp gave petitioner $8,100 to cover the cost of having the Aerocommander inspected and refurbished for the trip to South America. In addition, Tharp paid petitioner $3,700 for leasing petitioner's plane. Gov't C.A. Br. 7-8. During those months, petitioner showed the Aerocommander to Tharp's

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[2] As petitioner notes (Pet. 4 n.1), the district court designated petitioner's father – an attorney – as a special advisor to assist in supervising petitioner's probation. Gov't C.A. Br. 2.

[3] The file of petitioner's probation officer, Charles Perkins, contained no notation that petitioner had informed him of Tharp's solicitation. See Gov't C.A. Br. 15.

pilots who were assigned to the smuggling venture and talked to them about the plane's ability to fly at low altitudes. In late January or early February 1987, petitioner flew the plane to Panama City, Florida, where he attended a pilot training course. Gov't C.A. Br. 8-9.

By this date, federal authorities had initiated a criminal investigation of Tharp's activities. Neither Tharp nor petitioner was aware of that investigation. On February 6, however, Customs Agent Betty Commerford tracked the Aerocommander to Panama City and started making inquiries about the plane. Petitioner got wind of the agent's actions and then met with her. Petitioner explained that he was trying to sell the Aerocommander to Tharp. He stated that he did not think the deal would close but that if it did, he would notify the federal authorities in Mobile. Gov't C.A. Br. 9-10; see Tr. 124.[4] On February 9, petitioner met with Customs Special Agent Kyle Barnette in Mobile. During that interview, petitioner stated that he was brokering Tharp's purchase of the Aerocommander. Petitioner acknowledged that Tharp was a narcotics smuggler, but stated that he did not know how Tharp intended to use the plane. Gov't C.A. Br. 11.

As events unfolded, Tharp did not use the Aerocommander that petitioner had located, but used another plane

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[4] Petitioner telephoned his father on February 7, evidently to speak to him about the unfolding business with Tharp. Petitioner's father instructed him to contact his probation officer, Charles Perkins, and DEA Task Force agent Ed Odom. See Gov't C.A. Br. 14; Tr. 110-111.

On February 9, petitioner tried to contact both Perkins and Odom. See Gov't C.A. Br. 14. Odom was evidently unavailable, but according to petitioner, an unidentified agent told him to "go ahead and talk to the Customs people." Tr. 112. Petitioner testified that Perkins advised him to do the same. *Ibid.* In his affidavit, Perkins did not specifically recall speaking to petitioner on that date, although he did state that petitioner had called him sometime before the summer of 1987. See Gov't C.A. Br. 16-17; see also note 12, *infra*.

in his smuggling operation. On February 17, Customs agents arrested Tharp in Florida after that plane arrived carrying a load of 350 kilograms of cocaine. Tharp told the agents that petitioner knew from their initial meetings that Tharp needed a plane for narcotics smuggling. Gov't C.A. Br. 10; Tr. 11, 20-22, 67.

On February 24, Customs agents seized the Aerocommander petitioner had tried to sell to Tharp. After that seizure, petitioner contacted DEA Task Force agent Odom in order to explore the possibility of having the plane returned to its owner. Petitioner told Agent Odom that he had helped Tharp find the Aerocommander because he believed that Tharp needed the aircraft for his watermelon business. Petitioner explained that he had "believed [Tharp] was telling the truth at the time and he did not realize [Tharp] was involved in any illegal activity." Tr. 56; see Pet. App. 13a; Gov't C.A. Br. 11.

In light of petitioner's complicity in Tharp's thwarted smuggling operation, the case agent overseeing the investigation and Tharp's prosecution in the Middle District of Florida urged petitioner to testify as a cooperating witness for the government at Tharp's trial in mid-August 1987. Petitioner agreed to do so.[5] Petitioner later testified at

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[5] Petitioner agreed to testify without receiving immunity. Petitioner understood that the government would notify the district court supervising his probation of his cooperation. Gov't C.A. Br. 12.

Shortly before Tharp's trial began, the government notified the district court supervising petitioner's probation that it had information that petitioner was involved in Tharp's smuggling activities and that petitioner had agreed to testify as a government witness. See Letter from Gloria A. Bedwell, Assistant United States Attorney, to W.B. Hand, United States District Judge (Aug. 3, 1987) (sealed). The government also sought the court's permission to use petitioner as a cooperating informant in an investigation being conducted by the Customs Service. *Ibid.* The court held a conference and later denied that request.

Tharp's trial that he had known that Tharp was looking for a plane to smuggle narcotics. Petitioner explained that he would have received both the Aerocommander and $50,000 if Tharp had used the plane and the mission had succeeded. Petitioner also admitted that his dealings with Tharp amounted to a violation of the terms of his probation. Gov't C.A. Br. 12-13; Pet. App. 13a.[6] After Tharp's trial, petitioner's probation officer asked petitioner to provide a written statement detailing his participation in Tharp's illicit activities. Petitioner provided such a statement on August 18, 1987. Gov't C.A. Br. 15; Pet. App. 13a.

3. On November 22, 1988, petitioner's new probation officer, Donna Alexander,[7] filed in the district court a petition for revocation of his probation based on petitioner's complicity in Tharp's smuggling operation. The petition alleged that petitioner had violated the conditions of his probation by failing to notify his probation officer about his testimony at Tharp's trial in August 1987 (Condition 1),[8] by associating with Tharp in connection with his smuggling activities from late October 1986 to February 1987 (Condition 2), by involving himself with criminal activity during that period (Condition 9), and by failing to notify his probation officer when first solicited by Tharp in October

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[6] Tharp was convicted and later sentenced to a term of 13 years' imprisonment. Gov't C.A. Br. 13.

[7] In September 1988, Alexander had replaced Charles Perkins as petitioner's probation officer. At that time, Perkins left the probation service. Pet. 4.

[8] Given the government's full knowledge concerning petitioner's cooperation in the Tharp prosecution, see note 5, *supra*, this particular charge appears to have been unwarranted. In any event, the district court did not specifically address the extent to which petitioner violated the terms of his probation (including Special Condition 7) by failing to report promptly to his probation officer regarding his various dealings with Tharp and the resulting investigation.

1986 (Special Condition 7). Pet. App. 3a-4a. On November 23, the district court issued a summons and scheduled the probation revocation hearing for December 15, 1988. Gov't C.A. Br. 3-4.

4. The district court held the hearing on that date and, on petitioner's request, reconvened the hearing to receive additional evidence on January 6, 1989. In light of the evidence adduced at the hearing, the district court found that petitioner had violated the conditions of his probation.[9] Specifically, the district court found that petitioner had "associated with a known felon, Lucious Allen Tharp[,] * * * [in] direct violation of Condition 2." Pet. App. 4a. In addition, the court found that petitioner

> knew that Mr. Tharp was participating in an illegal activity, i.e., the illegal importation of contraband, yet continued to associate with Mr. Tharp, and in fact participated in said activity by attempting to secure, and securing an airplane for use in furtherance of [that] activity.

Ibid. The court determined that petitioner had therefore violated Conditions 1, 2, and 9 of his probation. Accordingly, on February 15, 1989, the court revoked the term of probation previously imposed and sentenced petitioner to a term of five years' imprisonment. *Id.* at 4a-5a.[10]

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[9] The district court issued its order on February 15, 1989. The district court apparently did not credit petitioner's testimony that he was unaware of Tharp's intentions until February 7, 1987, at which time he reported the incident to Probation Officer Perkins and another federal agent. See Tr. 100-113; see also note 4, *supra*. Petitioner's contrary testimony at Tharp's trial—which was received into evidence at the probation revocation hearing—showed that petitioner was well aware of Tharp's plans and stood to profit if Tharp had succeeded.

[10] Petitioner was remanded to the custody of the Attorney General on February 22, 1989. He reported to his designated institution on

5. On March 6, 1989, petitioner filed in the district court a motion for reconsideration contending, among other claims, that the "unreasonable delay in the bringing of the charges prejudice[d] the probationer and [was] fundamentally unfair." Pet. D.C. Br. and Argument at 3, *United States* v. *Haas*, No. 84-00005 (S.D. Ala.).[11] Petitioner pointed out that "the alleged violations of probation * * * occurred approximately two years prior to the filing of the petition for revocation," and that "[t]he alleged inappropriate conduct had long since been made known to the Probation Office, the United States Attorney's Office and to [the] Court." *Ibid.*[12]

March 7, 1989. See R.E. 5. ("R.E." refers to the Record Excerpts filed with petitioner's brief in the court of appeals).

[11] On February 22, the district court denied petitioner's first motion for reconsideration challenging the sufficiency of the evidence. Order, *United States* v. *Haas*, No. 84-00005 (S.D. Ala.). After receiving an ex parte communication from petitioner's father, however, the district court on February 27 vacated its earlier order and directed petitioner to submit a memorandum setting forth his basis for challenging the court's earlier findings. Order, *United States* v. *Haas*, No. 84-00005 (S.D. Ala.).

[12] Petitioner submitted a number of affidavits, including a statement taken from his former probation officer, Charles Perkins, who did not testify at the probation revocation hearing. See Affidavit of Charles A. Perkins (Mar. 5, 1989), Exh. B to Defendant's Mem., *United States* v. *Haas*, No. 84-00005 (S.D. Ala. filed Mar. 6, 1989). Perkins stated that "[a]t the time [he] left the probation service [in September 1988, he] did not personally know of any reason why a petition to revoke [petitioner's] probation should be filed." Exh. B, at 1-2, to Defendant's Mem., *supra*. Perkins also stated that, as a result of his attending a conference with the district court in August 1987, see note 5, *supra*, he knew that petitioner was scheduled to testify as a government witness at Tharp's trial in Florida. Exh. B, at 2, to Defendant's Mem., *supra*. Moreover, Perkins related "[his] understanding after this meeting at Judge Hand's office that there would be no action taken against

After receiving the government's response in opposition to petitioner's motion,[13] the district court denied that motion. Order, *United States* v. *Haas*, No. 84-00005 (S.D. Ala. Mar. 27, 1989). The court stated that it "remain[ed] reasonably satisfied that [petitioner's] conduct was not in compliance with the conditions of probation." Order at 1, *supra*. The court therefore affirmed its order revoking petitioner's probation.

6. In the court of appeals, petitioner argued (Pet. C.A. Br. 34-39) that the government (including his probation officer) knew of his alleged violations of probation since early February 1987, but waited until late November 1988 to file the revocation petition. He contended that such a substantial delay in seeking revocation of probation violated the Due Process Clause of the Fifth Amendment and otherwise barred the district court from revoking probation.[14] The court of appeals rejected that argument and affirmed without opinion. Pet. App. 1a.

[petitioner] unless he was prosecuted in connection with the matter down in Florida that we met concerning." *Id.* at 3.

[13] The government's response did not address petitioner's contention regarding the delay in commencing probation revocation proceedings.

[14] The government contended that the delay in filing the probation revocation petition did not warrant relief, because petitioner did not establish that that delay prejudiced him or that the delay was the result of the government's deliberate attempt to gain a tactical advantage. See Pet. App. 8a-15a.

Petitioner also contended that there was insufficient evidence to show that he had violated the conditions of his probation, Pet. C.A. Br. 39-42, that the district court had abused its discretion at sentencing, *id.* at 42-44, and that the revocation hearing was not conducted in accord with Fed. R. Crim. P. 32.1, Pet. C.A. Br. 45-46. The court of appeals rejected those claims, and petitioner does not present them for further review here.

ARGUMENT

1. Petitioner renews his contention (Pet. 5-11) that the substantial delay in filing the petition for revocation of probation violated the Due Process Clause of the Fifth Amendment and otherwise barred the district court from revoking probation. As this Court has recognized:

> Because the probation or parole officer's function is not so much to compel conformance to a strict code of behavior as to supervise a course of rehabilitation, he has been entrusted traditionally with broad discretion to judge the progress of rehabilitation in individual cases, and has been armed with the power to recommend or even to declare revocation.

Gagnon v. *Scarpelli*, 411 U.S. 778, 784 (1973); see *Griffin* v. *Wisconsin*, 483 U.S. 868, 875 (1987). A probation officer, for example, may wait to assess the effect of suspected violations before initiating revocation proceedings. See, *e.g.*, *Morrissey* v. *Brewer*, 408 U.S. 471, 479 (1972). Courts have therefore been reluctant to require probation officers to petition for revocation on the first indication that the probationer has violated the conditions of his sentence. See, *e.g.*, *United States* v. *Hamilton*, 708 F.2d 1412, 1415 (9th Cir. 1983); *United States* v. *Rice*, 671 F.2d 455, 458 (11th Cir. 1982).

Nevertheless, the Due Process Clause applies to probation revocation proceedings, and thus those proceedings—like other governmental actions affecting an individual's liberty—must not be "fundamentally unfair or arbitrary." *Bearden* v. *Georgia*, 461 U.S. 660, 666 (1983); see *Black* v. *Romano*, 471 U.S. 606, 611 (1985); *Gagnon* v. *Scarpelli*, 411 U.S. 778, 782 & n.4 (1973); see also Fed. R. Crim. P. 32.1. The Due Process Clause has a role, albeit a limited one, "in protecting against oppressive delay" in the filing of criminal charges. *United States* v. *Lovasco*, 431 U.S. 783,

789 (1977). That limited constitutional protection, the Court has held, *id.* at 789-790, is available only when the defendant's claim satisfies a two-part test. The defendant must actually have been prejudiced by the delay, and the government's reasons for the delay must be such as to make compelling the defendant to stand trial a violation of those "fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency." *Id.* at 790 (citations and internal quotation marks omitted).[15]

In applying the *Lovasco* standard, federal courts have generally held that relief is available only if the defendant is prejudiced and the government intended to delay the initiation of proceedings in order to obtain a tactical advantage over the defendant. *E.g.*, *United States* v. *Ismaili*, 828 F.2d 153, 166 (3d Cir. 1987), cert. denied, 485 U.S. 935 (1988); *United States* v. *Hoo*, 825 F.2d 667, 671 (2d Cir. 1987), cert. denied, 484 U.S. 1035 (1988); *United States* v. *Lebron-Gonzalez*, 816 F.2d 823, 831 (1st Cir.), certs. denied, 484 U.S. 843, 857 (1987); *United States* v. *Caporale*, 806 F.2d 1487, 1514 (11th Cir. 1986), certs. denied, 482 U.S. 917, 483 U.S. 1021 (1987); *United States* v. *Jenkins*, 701 F.2d 850, 854 (10th Cir. 1983); *United States* v. *Atisha*, 804 F.2d 920, 928 (6th Cir. 1986), cert. denied, 479 U.S. 1067 (1987). That reading of *Lovasco* is in accord with the Court's statement in *United States* v. *Gouveia*, 467 U.S. 180, 192 (1984), that "the Fifth Amendment requires the dismissal of an indictment * * * if the defendant can prove that the

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[15] In *Lovasco*, the Court held that, while the second part of the due process test could be satisfied where the government sought "to gain [a] tactical advantage over the accused," 431 U.S. at 795 (quoting *United States* v. *Marion*, 404 U.S. 307, 324 (1971)), it is not satisfied by investigative delay, *i.e.*, fundamental conceptions of justice are not offended when the delay is due to the government's continued criminal investigation, 431 U.S. at 790-796.

Government's delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense." See *Arizona* v. *Youngblood*, 109 S. Ct. 333, 337 (1988).[16]

The probation officer's decision to institute revocation of probation proceedings, like the prosecutor's decision to seek formal criminal charges, is largely a discretionary decision that affects an individual's liberty interest. In light of the similarities between these two important stages of the criminal justice process, a delay in filing a petition for revocation of probation should be subject to the same due process constraints that the Court articulated in *Lovasco*, and relief should be granted only in circumstances in which a due process violation would be found under the *Lovasco* standard. See *United States* v. *Brown*, 656 F.2d 1204, 1208 (5th Cir. 1981) (relief denied where delay in filing probation revocation petition did not prejudice probationer), cert. denied, 454 U.S. 1156 (1982); *Kartman* v. *Parratt*, 535 F.2d 450, 455 (8th Cir. 1976) (same principle applied to delay in holding parole revocation proceeding).

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[16] A minority view among the federal courts, in decisions predating *Arizona* v. *Youngblood*, 109 S. Ct. 333 (1988), treats *Lovasco* as not requiring an intentional seeking of tactical advantage or recklessness on the part of the prosecution. Those courts instead have suggested or held that less reprehensible governmental reasons for delay, assessed in light of the prejudice caused by the delay, can be sufficient to establish a violation of the Due Process Clause. See, *e.g.*, *United States* v. *Moran*, 759 F.2d 777, 782-783 (9th Cir. 1985), cert. denied, 474 U.S. 1102 (1986); *United States* v. *Townley*, 665 F.2d 579, 581-582 (5th Cir.), cert. denied, 456 U.S. 1010 (1982).

Here, petitioner does not claim that the delay in filing the probation revocation petition prejudiced his ability to defend the charges. For that reason, petitioner would not be entitled to relief under either formulation of the *Lovasco* standard. This case therefore does not present an occasion for the Court to address that issue.

Here, it is undisputed—and the record confirms—that petitioner violated the conditions of his probation by helping Tharp in his drug smuggling efforts from late October 1986 through early February 1987. Although the government certainly knew of petitioner's illicit activity in February 1987, the government, including petitioner's probation officer, did not learn the full extent of his participation until August 1987, after petitioner had testified at Tharp's trial and admitted his complicity in Tharp's narcotics smuggling efforts. The probation revocation petition was not filed until late November 1988, and therefore the pertinent period of delay is 15 months.[17]

Petitioner does not claim that the delay in filing the probation revocation petition prejudiced his ability to defend the charges. Indeed, the record makes plain that petitioner mounted a vigorous defense of those charges before the district court through the testimony and submissions of relevant witnesses. And petitioner did not even raise the issue of delay until the second motion for reconsideration after the district court had already issued its decision revoking probation. In these circumstances, the court of appeals correctly rejected petitioner's claim that the delay in filing for revocation of his probation violated the Due Process Clause or otherwise barred the district court from revoking probation. See *United States* v. *Rice*, 671 F.2d at 457-458 (17-month delay between probation officer's learning of

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[17] For that reason, petitioner is wrong in contending (Pet. i, 5 n.2, 10 n.4) that the relevant period of delay is 22 months, *i.e.*, commencing in February 1987, when the government first became aware of petitioner's involvement with Tharp. Petitioner properly refrains from embracing the view—rejected by federal courts—that a probation officer must petition for revocation on the first indication that the probationer has violated the conditions of his sentence. See, *e.g.*, *United States* v. *Hamilton*, 708 F.2d at 1415; *United States* v. *Rice*, 671 F.2d at 458.

violation and filing of revocation petition did not constitute due process violation).[18]

2. Petitioner contends (Pet. 7-10) that the court of appeals' decision conflicts with the decisions in *United States* v. *Tyler*, 605 F.2d 851 (5th Cir. 1979), and *United States* v. *Hamilton*, 708 F.2d 1412 (9th Cir. 1983), where the courts awarded relief based on substantial delays in filing probation revocation petitions without regard to any prejudice suffered by the probationer. In *Tyler*, which involved a delay of 27 months, the probation officer had also deliberately withheld the violations on which revocation was based from an earlier unsuccessful revocation proceeding. 605 F.2d at 852-853. In those circumstances, the Fifth Circuit held that "such a lengthy delay, coupled with the probation officer's obvious decision not to file these charges in the first petition, is fundamentally unfair." *Id.* at 853. In *Hamilton*, which involved a delay of 36 months, the probationer himself had notified the probation office and the district court of his alleged violation at that time, *i.e.*, failure to complete 22 days of his scheduled 120-day sentence, and

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[18] Petitioner has made no claim that the delay in filing the probation revocation petition was the result of bad faith on the part of the government, and the record does not support such a claim.

Petitioner does assert that "there is no question on this record that it was only the change of probation officers that resulted in the revocation of [his] probation." Pet. 10; see *id.* at 13. While the change in probation officers was no doubt one reason the revocation petition was filed when it was, there is no basis for drawing any negative inference from the effect of a change in personnel. As petitioner concedes, see *id.* at 4, his replacement probation officer imposed a more stringent regime of supervision. It is therefore plausible that the change in personnel prompted a reexamination of petitioner's probation file, since petitioner's former officer, Charles Perkins, had neglected to take action in the face of substantial and corroborated evidence that petitioner had engaged in criminal conduct in violation of the conditions of his probation.

specifically asked the court to reschedule the remaining portion of his sentence, but neither took any corrective action. 708 F.2d at 1414-1415. The Ninth Circuit concluded:

> At some point * * * violations of which the district court has been apprised and upon which the probationer has sought corrective action become stale or are waived as a basis for revoking probation. * * * Three years is beyond that point under the circumstances of this case.

Id. at 1415 (citing *Tyler*, 605 F.2d at 853).

Because the court of appeals in this case affirmed the district court's probation revocation order without issuing an opinion, the basis for its decision is not clear. Even assuming, however, that the court below relied on analysis different from that used in *Tyler* and *Hamilton*, there is still no square conflict among the courts of appeals that warrants further review. *Tyler* and *Hamilton* do not expressly disavow an inquiry into prejudice and bad faith conduct on the part of the government. To the contrary, the circumstances in each of those cases were unusual: the delays were more than two years, and in each case there was deliberate governmental action that affirmatively misled the probationer into believing that any violation would not be used against him. Petitioner's case is readily distinguishable from *Tyler* and *Hamilton*. The delay in petitioner's case was substantially less than in *Tyler* and *Hamilton*, and there was no affirmative government misconduct in this case that misled petitioner the way the defendants in *Tyler* and *Hamilton* were misled.[19] Accordingly, review by this Court is unwarranted.

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[19] Despite petitioner's suggestion (Pet. 10 n.4), neither *United States* v. *Sciuto*, 531 F.2d 842 (7th Cir. 1976), nor *Greene* v. *Michigan Dep't of Corrections*, 315 F.2d 546 (6th Cir. 1963), expressly adopts an approach to analyzing delay in the filing for revocation of probation

CONCLUSION

The petition for a writ of certiorari should be denied.
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without regard to prejudice or bad faith on the government's part. In *Sciuto*, the court of appeals stated in dicta that "[w]hether the delay [in filing for revocation of probation] was unreasonable depends upon whether [the probationer] deceived the probation officer." 531 F.2d at 847. That passing statement scarcely amounts to a legal principle that a delay, without more, constitutes a violation of the Due Process Clause.

In *Greene*, which involved a delay of over nine years between the alleged parole violation and the arrest of the parolee, the court of appeals stated that failure to "proceed with reasonable diligence to issue and execute a warrant for the arrest of the parolee * * * may result in a waiver of the violation and loss of jurisdiction." 315 F.2d at 547. The court accordingly remanded for a hearing on "whether the parole authorities acted with reasonable dispatch." *Id.* at 548. It therefore does not appear that *Greene* would have authorized dismissal based on the passage of time alone. In any event, both *Sciuto* and *Greene* were decided before this Court's decision in *Lovasco*. The courts therefore did not have occasion to determine how the analysis in *Lovasco* should apply to the probation revocation proceedings in those cases.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

THOMAS M. HAAS, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF OF PETITIONER

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TABLE OF AUTHORITIES

Cases

	Page
Morrissey v. *Brewer*, 408 U.S. 471 (1972)	2, 4, 5
United States v. *Hamilton*, 708 F.2d 1412 (9th Cir. 1983)	4, 5, 6, 7
United States v. *Lovasco*, 431 U.S. 783 (1977)	3, 4
United States v. *Marion*, 404 U.S. 307 (1971)	4
United States v. *Tyler*, 605 F.2d 851 (5th Cir. 1979)	3, 5, 6, 7

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REPLY BRIEF OF PETITIONER

The United States concedes that after learning the complete circumstances of petitioner's probation violation, it delayed, without any explanation, for at least 15 months, and more likely for 22 months, before seeking to revoke his probation. Opp. 13 & n.17.[1] In fact the United States acknowledges that the delay was attrib-

[1] In the court below, the United States declared unequivocally that the delay was 22 months. Pet. 5 n.2. Petitioner accepted that statement in drafting the petition because the United States Attorney in Alabama, who prepared the brief in the court of appeals, was in the best position to know what his clients knew and when. The Solicitor General, however, now complains that "[a]lthough the government certainly knew of petitioner's illicit activity in February 1987," it "did not learn of the full extent" of the violation until petitioner provided a detailed written statement of the relevant events seven months later. Opp. 13. While the government may have learned additional details in August, the government's own statement of the undisputed record makes clear that *petitioner* himself notified every relevant federal official—including his probation officer—in February 1987. Opp. 4-5 nn.4 & 5. Thus, in fact, the delay was 22 months.

utable to nothing more than a random change in government personnel: Petitioner's original probation officer resigned from service in September, 1988 and was replaced by someone who applied different standards to reach a different conclusion, without regard to whether that change in any way promoted the rehabilitation purposes of the probationary system. Opp. 6, 14 n.18.

The revocation of probation under such circumstances serves no legitimate objective and, in fact, frustrates the purposes of the probationary system. It is undisputed that, during the 22 month delay, petitioner conformed his behavior to every condition of his probation. At the time of the revocation, he was a responsible and law-abiding citizen with a thriving charter airline business, which had a client list that included a United States Senator. By revoking petitioner's probation, the United States shattered petitioner's personal and professional life and ignored its own "stake in whatever may be the chance of restoring him to normal and useful life within the law." *Morrissey* v. *Brewer*, 408 U.S. 471, 484 (1972). In light of the utter lack of support for the government's conduct, the United States' technical legal analysis in response to the petition is both cynical and wholly inadequate.

What the government's brief does demonstrate quite forthrightly is that the legal issue of unexcused delay in bringing a revocation action is squarely presented in this case. Moreover, the government makes no claim that that issue is not important or that it is not recurring. Instead, it argues that revocation was appropriate on the merits, even after a 22 month delay, and that the conflicting holdings in the circuits can be distinguished on factual grounds. Neither of these arguments has merit and therefore the Court should grant the petition to resolve the fundamental question of law presented, which has divided the courts of appeals.

1. The United States' central argument in opposition to the petition is that the result reached below is correct

under the standard applicable to pre-indictment delay. Opp. 11-12 (citing *United States* v. *Lovasco*, 431 U.S. 783 (1977)). Under the *Lovasco* standard, a party must show proof of (1) actual prejudice and (2) intentional misbehavior or bad faith conduct on the part of the government designed to obtain tactical advantage. Opp. 11-12. Thus, based on the analogy between preindictment delay and delay in revocation proceedings, the United States concludes that because petitioner failed to prove prejudice and bad faith misconduct (as required under the *Lovasco* standard), the courts below did not err in revoking probation despite the unexcused delay.[2] Opp. 12 n.16 (because of failure to prove prejudice, "petitioner would not be entitled to relief under . . . *Lovasco*"); Opp. 14 n.18 ("there is no basis for drawing any negative inference" of bad faith from fact that "replacement probation officer imposed a more stringent regime of supervision").

The argument based upon *Lovasco* provides no basis for denying review in this case. Whatever the merits of the government's analogy, the fundamental point for purposes of certiorari is that two other circuits have *not* followed the *Lovasco* standard and have instead found an abuse of discretion or due process violation based on undue delay without any demonstration of prejudice or bad faith. For example, in *United States* v. *Tyler*, 605 F.2d 851 (5th Cir. 1979), the Fifth Circuit analyzed a lengthy delay in seeking revocation in light of the unique "interests of both society and the probationer" and the goals of the probation system. *Id.* at 853; see also *id.*

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[2] Petitioner does not disagree with the United States (Opp. 10, 13 n.17) that the interests of justice are not served by requiring a probation officer to move to revoke immediately after a possible violation. But a holding that the United States cannot wait 22 months before seeking revocation at the request of a new probation officer who relies upon no new violations will not interfere with the government's legitimate interest in having a full opportunity to evaluate whether a violation warrants revocation in light of all of the circumstances.

("unreasonable delay in bringing charges of violations or a piecemeal approach in seeking revocation will rarely, if ever, serve the interest of either [society or probationer]"). The Fifth Circuit concluded—without any discussion of *Lovasco* or the standards applicable to pre-indictment delay—that such a delay was "fundamentally unfair" and a violation of due process.

Similarly, in *United States* v. *Hamilton*, 708 F.2d 1412 (9th Cir. 1983), the Ninth Circuit, in an opinion by then-Judge Kennedy, concluded that:

> The interests of fairness require some level of consistency in the supervision of a probationer. If a newly assigned probation officer intends to enforce probation conditions more stringently than his predecessor, the probationer must be advised of that policy before its violation can become the basis for revocation. *Id.* at 1415.

Thus, the Ninth Circuit concluded—again without any reference to *Lovasco* or to its standards—that revocation of probation following an unreasonable delay (resulting from a change in probation officers) constituted an abuse of discretion. *Id.* at 1416.

In sum, at least two circuits have—with good reason [3]—decided this issue without reference to the *Lovasco*

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[3] The decision of the Ninth and Fifth Circuits not to look to the pre-indictment delay cases for an analogy was reasonable. As *Lovasco* itself makes clear, "statutes of limitations, which provide predictable, legislatively enacted limits on prosecutorial delay, provide 'the primary guarantee against bringing overly stale criminal charges.'" *Lovasco*, 431 U.S. at 789 (quoting *United States* v. *Marion*, 404 U.S. 307, 322 (1971)). Therefore, in the context of pre-indictment delay, "the Due Process Clause has a limited role to play in protecting against oppressive delay." *Id.* The United States' analogy (Opp. 10-14) ignores the differences between delay in the context of indictment and in the context of probation revocation.

Probation is supposed to be a constructive, as well as punitive, process and probation should be revoked only when the probationer cannot be counted on to avoid antisocial activity. See *Morrisey*, 408 U.S. at 479-480; *Hamilton*, 708 F.2d at 1415. The delay in this case

standards and in a manner flatly contrary to the position advocated by the United States in this Court and in the court below. Even if those courts are wrong (and they are not), the correct response would not be to deny certiorari, but to grant the petition and establish a uniform federal standard.

2. The United States is plainly incorrect in arguing that the holding below is not "squarely" in conflict with *Hamilton* and *Tyler*. The government argues that those cases are not necessarily inconsistent with the government's theory because they "do not expressly disavow an inquiry into prejudice and bad faith conduct on the part of the government." Opp. 15. The dispositive point, of course, is that neither case even mentions such an "inquiry" or the *Lovasco* case on which it is based. Moreover, the natural reading of those cases is that those courts clearly do not require such an inquiry; in both cases, a revocation order was vacated without any evidence of prejudice or bad faith within the meaning of *Lovasco*. That is precisely the reading that the United States gave those cases below, when it urged the Eleventh Circuit not to follow them. Had the Eleventh Circuit not followed the United States' urging and departed from the Fifth and Ninth Circuits' standard, petitioner would be free today.[4]

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meant that revocation proceedings were initiated after petitioner had become settled in his family life, in his growing business and in his community. See Pet. 3. Indeed, the legislative interest in rehabilitation which underlies the probationary system—and the need for fairness, accuracy and consistency (see, *e.g.*, *Morrissey*) in support of that interest—suggests that a delay in revocation proceedings of 15-22 months based on nothing more than the shifting preferences of individual probation officers should be *per se* impermissible.

[4] The government's argument in this respect has presented something of a moving target. When petitioner first complained of delay, in the district court, the United States simply did not respond

The United States also argues that the Fifth and Ninth Circuit decisions can be distinguished on the ground that "in each case" government conduct "misled the probationer into believing that any violation would not be used against him." Opp. 15. However, this effort to distinguish the *Hamilton* and *Tyler* actions simply misstates the plain holding of the two cases:

> Revocation of probation after unreasonable delay *or* under circumstances inherently misleading to the probationer is an abuse of discretion. See *United States* v. *Tyler*, 605 F.2d 851, 853 (5th Cir. 1979) (emphasis added).

Hamilton, 708 F.2d at 1415.[5] In stating the test in the disjunctive, the *Hamilton* opinion makes clear that either unreasonable delay or misleading circumstances could constitute an abuse of discretion. See also *id.* ("At some point, however, violations . . . become stale or are waived as a basis for revoking probation").

In any case, even if *Hamilton* and *Tyler* could be read to require a showing of "circumstances misleading to the

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and the district court did not address the issue. Opp. 9 & n.13. Then, in the Eleventh Circuit, when petitioner relied upon the Fifth and Ninth Circuits' decisions to support his claim based on delay, the United States acknowledged the conflict and urged the court of appeals not to follow those decisions but to affirm the revocation on the ground that the district court record did not support a showing of actual prejudice and deliberate misconduct on the part of the government. Opp. 9 n.14; see Pet. App. 10a. Now, the United States argues that those cases are in fact correct and that there is no conflict.

[5] The United States also attempts to distinguish the result in *Tyler* and *Hamilton* on the ground that the delays in those cases, 27 and 36 months respectively, were more egregious than the 15 to 22 month delay in this case. Opp. 15. But, the fact that the delay in those cases was longer does not mean that the delay in this case is acceptable. Moreover, the Ninth Circuit in *Hamilton* held that delay attributable to nothing more than a change in probation officers is in itself an abuse of discretion. See *Hamilton*, 708 F.2d at 1415.

petitioner," the undisputed facts in this case are more than sufficient to sustain such a showing. The United States' brief quotes petitioner's original probation officer as expressing the "understanding after this [August, 1987] meeting at Judge Hand's office that there would be no action taken against [petitioner] unless he was prosecuted in connection with the [Tharp trial]." Opp. 8 n.12. *After* the meeting at which this "understanding" developed, petitioner voluntarily and without immunity provided the testimony that assisted in Tharp's conviction. Opp. 5-6. That same testimony then led to petitioner's own probation revocation and imprisonment. Opp. 5-6; see Opp. 7 n.9 (arguing that probation revocation supported by petitioner's testimony at Tharp trial). Thus, to the extent there is some requirement that the government must "mislead" a probationer, the evidence here is at least as strong as in *Tyler* and *Hamilton*.

At bottom, the conflict among the circuits on this issue is clear: Had petitioner been on probation in California or Texas, the unreasonable and unjustifiable delay in seeking to revoke his probation would have resulted in that order being vacated on appeal—without inquiry into whether the government acted in bad faith or misled petitioner or whether petitioner was prejudiced by the delay. The United States recognized this potential result when it candidly urged the court of appeals below not to follow the Ninth or Fifth Circuit. Given the fundamental unfairness of the result sanctioned by the decision below and the conflict among the circuits on this issue, this Court should grant the petition and provide guidance on this fundamental and recurring question of federal law.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit should be granted.

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